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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 879

UNITED STATES OF AMERICA ex rel. GEORGE ATTERBURY,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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JOSEPH E. RAGEN, Warden, Illinois State Penitentiary, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

George Atterbury, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on November 6, 1956.

CITATION TO OPINION BELOW.

The opinion of the Court of Appeals, reprinted in Appendix A hereto, is reported in 237 F. 2d 953 (7th Cir. 1956).

JURISDICTION.

The judgment of the Court of Appeals was entered on November 6, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). By order of Mr. Justice Burton, dated January 17, 1957, the time in which to file this petition was extended to and including April 5, 1957.

QUESTIONS PRESENTED.

1) Whether petitioner, an Illinois State Penitentiary inmate, stated a cause of action under the Civil Rights Act, 42 U.S.C. § 1983, when he alleged that the respondent prison officials, acting under color of law, brutally beat him, thereby depriving him of his right not to be subjected to cruel and unusual punishments or deprived of life or liberty without due process of law as guaranteed by the Eighth and Fourteenth Amendments to the Constitution.

2) Whether the complaint of petitioner, an indigent state prisoner who was unable because of his confinement, to appear pro-se when his case was called for trial and who was denied court-appointe counsel, was properly dismissed "for want of prosecution."

STATUTES INVOLVED.

Revised Statutes, § 1979 (42 U.S.C.A. § 1983):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Act of June 25, 1948, c. 646, 62 Stat. 932, As Amended, Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241 (28 U.S.C.A. §1343):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

STATEMENT.

Throughout the proceedings below, petitioner, George Atterbury, was confined in the Illinois State Penitentiary. At all times he was a pauper, unable to pay costs or retain counsel. At no time was he represented by counsel until after the decision of the Court of Appeals.

Petitioner brought this action in the U.S. District Court for the Northern District of Illinois against the warden, assistant warden and two guards of the pentitentiary. The complaint charged that the defendants were liable in damages under the Federal Civil Rights Act, 42 U.S.C. § 1983. It asserted that on two occasions defendants had "unlawfully, knowingly and willfully entered into a conspiracy wherein, while acting under color of State's law and under the guise of discipline, the defendants • • • violently made an assault • • • upon the plaintiff with a dangerous weapon wherein, the plaintiff were inhumanly and viciously beaten upon his personal body for which serious physical injuries were inflicted." (R. 12, 13).

The complaint set out 42 U.S.C. § 1983 in full, (R. 15) and invoked the jurisdiction of the District Court under 28 U.S.C. §1343. (R. 11-12). It cited the Fourteenth Amendment's due process clause and stated that the beatings constituted "cruel and inhuman punishment." (R. 14). It alleged damages (R. 15) and demanded a jury. (R. 16).

District Judge John P. Barnes, under the impression that the complaint was a petition for a writ of habeas corpus, appointed counsel to represent petitioner, and set the case for "hearing" on March 27, 1956. (R. 30). When appointed counsel discovered that the action was for damages, he requested permission to withdraw, stating that "it is not the policy of this Court to appoint attorneys" in such cases. (R. 33). Judge Barnes granted counsel's motion on March 21, 1956. (R. 36). The certified transcript

subsequently filed in the Court of Appeals does not disclose whether notice of this order was ever served on petitioner. (1)

On March 27, 1956, the case was called. Petitioner, still confined, was unable to appear. Judge Barnes thereupon entered the following order: "This cause this day being called for trial and the parties failing to respond thereto on the Court's own motion it is Ordered that the complaint herein be and the same hereby is dismissed for want of prosecution. * * * " (R. 38). No appearance had ever been filed by respondents.

On November 6, 1956, the Court of Appeals affirmed the judgment of dismissal below. The court held that petitioner's complaint stated no cause of action under 42 U.S.C. § 1983.

In January, present counsel entered the case. (Supp. R. 1) Prior to this time petitioner had not been represented by counsel in either the District Court or the Court of Appeals.

On March 7, 1957, a motion for recall of the mandate was filed by counsel for petitioner. (Supp. R. 6) The affidavit accompanying this motion pointed out that in dismissing the complaint, the District Court had ignored Rule 15 (a) of the Federal Rlues of Civil Procedure which provides that a plaintiff may amend his complaint once, as of course, prior to the filing of a responsive pleading. (Supp. R. 9). This motion was denied, the Court of Appeals ruling that petitioner had waived his right to assert non-com-

(1) In their motion to recall the mandate of the Court of Appeals, filed on March 7, 1957, counsel for petitioner informed the Court of Appeals that the docket sheet in the District Court revealed that notice of this order was mailed to petitioner one day prior to the date set for "hearing" by Judge Barnes. (Supp. R. 7)

pliance with Rule 15 (a) by failing to attempt to file an amended complaint after his original complaint had been dismissed. (Supp. R. 10).

REASONS FOR GRANTING THE WRIT.

1) The holding of the Court of Appeals that the complaint of a prisoner alleging a brutal beating by prison officials fails to state a cause of action under 42 U.S.C. § 1983, conflicts with decisions of the Fifth Circuit in *U.S.* v. *Jones,* 207 F. 2d 785 (1953) and *U.S.* v. *Walker,* 216 F. 2d 683 (1954), *cert. den.* 348 U.S. 959 (1955); and with the decision of the Eighth Circuit in *U.S.* v. *Jackson,* 235 F. 2d 925 (1956).

2) The holding of the Court of Appeals that 42 U.S.C. § 1983 does not apply to acts which violate state law, conflicts with the interpretation of § 1983 by the Fifth Circuit in *U.S.* v. *Jones,* 207 F. 2d 785 (1953) and the Ninth Circuit in *Romero* v. *Weakley,* 226 F. 2d 399 (1956).

3) This case presents an important constitutional question which has not been, but should be, decided by this court: whether the due process clause of the Fourteenth Amendment affords the same protection against state-inflicted cruel and unusual punishments which the Eighth Amendment affords against similar action by the Federal Government.

4) The dismissal of petitioner's complaint "for want of prosecution" conflicts in principle with *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

5) The sanction by the Court of Appeals of the dismissal "for want of prosecution" calls for correction by this court in the exercise of its supervisory jurisdiction over the administration of justice in the federal courts.

1. The Court of Appeals affirmed the dismissal of petitioner's complaint on the ground that petitioner failed to state a cause of action under 42 U.S.C. § 1983.

Two circuits have reached conclusions opposite to that reached below. *U.S.* v. *Jackson,* 235 F. 2d (8th Cir. 1956); *U.S.* v. *Walker,* 216 F. 2d 683 (5th Cir. 1954), *cert. den.* 348 U.S. 959 (1955); *U.S.* v. *Jones,* 207 F. 2d 785 (5th Cir. 1953). In each of these cases, a state prisoner was alleged to have been beaten by his keepers. In each, the Civil Rights Act was held applicable and the right to invoke federal jurisdiction upheld.

Jackson, Walker and *Jones* involved criminal prosecutions under the Civil Rights Act; the instant case involves a civil suit under the Act. However, the civil and criminal provisions of the Act are *in pari materia. Picking* v. *Pennsylvania Railroad,* 151 F. 2d 240, 248 (3d Cir. 1945); *Screws* v. *U.S.,* 325 U.S. 91, 99 at note 8 (1945). The Seventh Circuit itself recognizes this principle. *Geach* v. *Moynahan,* 207 F. 2d 714, 717 (7th Cir. 1953). Title 42, § 1983, invoked in the instant case, is in substance the same as 18 U.S.C. § 242, involved in *Jackson, Walker* and *Jones,* except for the difference in the sanction provided. Therefore, the decision below has created a square conflict between the Circuits. ([2])

2. The court below avoided the constitutional issue presented in this case by reading an unwarranted exception into the Civil Rights Act. Thus, the court stated

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([2]) Three district court decisions also conflict with the decision below: *McCollum* v. *Mayfield,* 130 F. Supp. 112 (N.D. Cal. 1955); *Siegel* v. *Ragen,* 88 F. Supp. 996 (N.D. Ill. 1949) (decision as to plaintiff Harp); *Gordon* v. *Garsson,* 77 F. Supp. 477 (E.D. Ill. 1948).

that petitioner's charges "do not state a claim • • • under the • • • Act" because " 'The common law provides adequate action against errant law enforcement officials.' " 237 F. 2d 953 at 955, Appendix A, p. 15.

Jurisdiction to entertain Civil Rights complaints is vested in the District Courts by 28 U.S.C. § 1343. Neither this section nor 42 U.S.C. § 1983 makes any exception for acts which also violate state law. Other Courts of Appeal have refused to read such an exception into the Act. *U.S.* v. *Jones,* 207 F. 2d 785 5th Cir. 1953) passed upon the precise point and squarely opposes the holding below. And in *Romero* v. *Weakley,* 226 F. 2d 399, 401 (1956), the Ninth Circuit held that, in dismissing a Civil Rights complaint, a district court had acted "from a viewpoint exactly contrary to this obvious purpose of the civil rights legislation to give the litigant his choice of a federal forum rather than that of a state."

The question is basic to the application of the Act and the conflict should be resolved by this court.

3. To state a cause of action under 42 U.S.C. § 1983, three things are necessary: the plaintiff must be within the jurisdiction of the United States; he must show that the defendants acted under color of law; and he must show that the acts alleged deprived him of a right, privilege, or immunity secured by the Constitution.

The first two requirements are clearly met by petitioner's complaint. (R. 12) The only remaining question is whether petitioner properly alleged the violation of a Constitutional right.

The complant alleged a brutal beating by prison officials (R. 12) which infringed petitioner's rights under the Fourteenth Amendment's due process clause. (R. 14).

Whether the Fourteenth Amendment affords protection against cruel and unusual punishments has been considered but never decided by this Court.

In *Louisiana* ex rel. *Francis* v. *Resweber,* 329 U.S. 459, 462 (1947), this court said: "* * * we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the Eighth Amendment * * * as to * * * cruel and unusual punishment would be violative of the due process clause of the Fourteenth Amendment."

In both *Johnson* v. *Dye,* 338 U.S. 864 (1950) and *Sweeney* v. *Woodall,* 344 U.S. 86 (1952), the same question was presented but not decided.

It is hard to imagine a right more fundamental than the right to be free from cruel and unusual punishments. Such conduct as charged here on the part of prison functionaries is indeed "calculated to discredit law and thereby to brutalize the temper of a society * * * " *Rochin* v. *California,* 342 U.S. 165, 174 (1952). This court should set at rest any doubt that the Fourteenth Amendment affords protection against such conduct.

4. Even though the Court of Appeals erred in holding that petitioner stated no cause of action, the result below may be correct if the District Court properly dismissed the complaint "for want of prosecution." The propriety of that action is therefore an additional issue before this Court.

In the instant case petitioner was indigent (R. 5-9, 20) and appeared pro-se. District Judge Barnes denied him court-appointed counsel. (R. 36). The case was dismissed

"for want of prosecution" when petitioner failed to appear in court on the appointed day because of his confinement. (R. 38).

This ruling discriminated against petitioner because of his poverty. It conflicts in principle with the decision of this court in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). In *Griffin*, this court denounced an Illinois procedure which, in effect, discriminated between rich and poor in makng appellate review available to those convicted of crime; the court held that the Fourteenth Amendment prohibited such a discrimination.

The District Court below will not appoint counsel in suits under the Civil Rights Act. Because he is confined, the poor prisoner cannot appear pro-se when his case is called. Thus, the petitioner and others who cannot afford to hire counsel are effectively denied their rights under the statute. A far less shocking condition was condemned in *Griffin*.

5. Under the "all writs" section of the Judicial Code, 28 U.S.C. § 1651, the District Court might have issued an ancillary writ of habeas corpus comanding the production of the petitioner so that he might argue his own case. *Price* v. *Johnson*, 334 U.S. 266 (1948). In the alternative, the court had power to appoint counsel for petitioner, even though petitioner's case was an action for damages. 28 U.S.C. § 1915 (d). Either way, the unreasonable result reached by a dismissal for want of prosecution—refusal to hear a prisoner's proof of unconstitutional violence—is avoided.

This court has the power and responsibility to supervise lower federal courts so as to insure maintenance of "civilized standards of procedure." *McNabb* v. *United States*, 318 U.S. 332, 340 (1945). A dismissal for want of prosecution as the necessary result of a plaintiff's poverty, is such a departure from the accepted and usual standards of judicial proceedings as to call for the exercise of this Court's supervisory power.

Conclusion.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A.

OPINION OF THE COURT OF APPEALS.

In The
United States Court of Appeals
For the Seventh Circuit
No. 11756
September Term and Session, 1956

United States of America ex rel.
George Atterbury,
Petitioner-Appellant,

v.

Joseph E. Ragen, Warden,
Illinois Penitentiary, et al.,
Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

November 6, 1956.

Before Duffy, *Chief Judge*, and Finnegan and Schnackenberg, *Circuit Judges*.

Duffy, *Chief Judge*. Plaintiff brings this action under the Civil Rights Act, 42 U.S.C.A. §1981 *et seq*. He asserts that he is now and for some time past has been imprisoned in the Illinois State Penitentiary at Joliet, Illinois. Defendant Ragen is the Warden of the Penitentiary, and the other defendants are officers and guards at that institution. Plaintiff charges that as a result of a conspiracy, and acting under the color of state law, defendants, on

various dates in 1954 and 1955 cruelly and violently beat and assaulted plaintiff with a dangerous weapon inflicting physical injuries. Plaintiff asserts that he has been deprived of his rights, privileges and immunities to be secure from cruel and inhuman punishment, and has been deprived of his civil rights. He sets forth verbatim in the complaint the provisions of §1983, Title 42. He demands judgment in the sum of $200,000.00.

Under the belief that plaintiff had made an application for a writ of habeas corpus, the District Court appointed an attorney to represent him. Thereafter, said attorney informed the Court the pending action was in fact one for damages in a civil suit and requested that he be permitted to withdraw from the case. The Court granted this request. Thereafter the Court, on its own motion, dismissed the action. Plaintiff appealed to this Court *in forma pauperis.*

The brief in this case was prepared by the plaintiff. In it he amplifies and gives many details as to vicious beatings which he alleges he received at the hands of the various defendants. He complains that he was placed in solitary confinement in "the hole" for two months without clothes or blankets, and that for a period of five days he was deprived of any food. He also alleged that he had been denied mail including a copy of the constitution of Illinois sent to him at his request by the Secretary of State, Strictly speaking, these allegations are not a part of the complaint, but in view of the summary manner in which the complaint was dismissed in the District Court, and in view of Rule 15, Federal Rules of Civil Procedure, which provides that a party may amend his pleadings once as a matter of course before a responsive pleading is served, we shall consider that if plaintiff had been given

the opportunity, he would have amended his complaint to include these allegations. In fact, plaintiff asserts in his brief that Warden Ragen refused to mail out an amended petition (complaint) which he had prepared.

It would make no difference in the disposition of the issues before us whether we give consideration to the additional allegations set forth in plaintiff's brief. The incidents cited are of the same general nature and description as those alleged in the complaint. In either case, it is clear that the alleged tortious conduct of defendants was and is contrary to the laws of Illinois. In our view, such charges of aggression by state prison officials and guards, in spite of the general assertion that they were acting under color of state law, do not state a claim upon which relief can be granted under the federal Civil Rights Act. *Ortega* v. *Ragen,* 7 Cir., 216 F. 2d 561, certiorari denied 349 U.S. 940; *Jennings* v. *Nester,* 7 Cir., 217 F. 2d 153, certiorari denied 349 U.S. 958. As we said in the *Jennings* case, page 155, "The common law provides adequate action for damages against errant law enforcement officials."

Plaintiff relies upon and quotes extensively from *Johnson* v. *Dye, Warden,* 3 Cir., 175 F. 2d 250. However, this case was reversed by the United States Supreme Court in 338 U.S. 864, rehearing denied 338 U.S. 896. This Supreme Court ruling was approved and followed in *Sweeney* v. *Woodall,* 344 U.S. 86, 88. In the *Sweeney* case petitioner was a fugitive from an Alabama prison. He complained of shocking brutalities suffered in that prison, and alleged such conduct would be continued by prison authorities should he be returned. He filed a petition for a writ of habeas corpus in Ohio, invoking the Eighth and the Fourteenth Amendments. The Supreme Court said the petitioner must test the unconstitutionality of his treat-

ment in the courts of Alabama, and held that the United States District Court in Ohio properly dismissed the application for a writ of habeas corpus on its face.

We are somewhat concerned at the ever-increasing number of applications for habeas corpus and suits brought under the Civil Rights Act which are filed in the federal courts in this Circuit by prisoners in state penal institutions, where the basis of the complaint is the alleged brutal treatment by prison officials or other complaints with reference to the rules and regulations pertaining to prison discipline. For the most part such applications and suits are futile for the reasons hereinafter stated.

We think it is advisable to quote from some of our previous decisions to demonstrate why federal courts have an extremely limited area in which they may act pertaining to the treatment of prisoners confined to state penal institutions.

In *Siegel et al.* v. *Ragen, et al.*, 180 F. 2d 785 where the prisoner claimed he had been placed in solitary confinement and his typewriter confiscated, we stated, page 788: "The Government of the United States is not concerned with, nor has it power to control or regulate the internal discipline of the penal institutions of its constituent states."

In *United States ex rel. Morris* v. *Radio Station WENR*, 7 Cir., 209 F. 2d 105, the prisoner complained that he was discriminated against as to certain radio programs because he was a negro and complained because the warden would not permit him to submit various literary scripts to publishing companies. We said, page 107: " * * * Federal courts will rarely intervene to interfere with the conduct of State officials carrying out their duties under State

laws. *Kelly* v. *Dowd,* 7 Cir., 140 F. 2d 81." We further stated, page 107: "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safe-guarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts. *Kelly* v. *Dowd, supra.* 'We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.' *Stoud* v. *Swope, Warden,* 9 Cir., 187 F. 2d 850, 851. A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in violation of his constitutional rights."

In the accompanying case of *Morris* v. *Igoe,* 209 F. 2d 108, Morris complained that he had subscribed to certain Chicago newspapers, but the warden censored same by cutting out stories and portions of the papers. Morris claimed this was a violation of his constitutional rights. We held to the contrary.

In *Ortega* v. *Ragen,* 7 Cir., 216 F. 2d 561, at 562 we said: "This court has been hesitant to interfere with the administration of state penal institutions (citing Morris cases). It has been held that withholding a prisoner's mail is purely an administrative matter for the warden to control (citing cases). Certainly the control of mail going to and from inmates is an important part of administration and maintenance of discipline in a large prison. The mere withholding of a letter from a prisoner is not, of itself, violative of plaintiff's federal rights."

(Appendix)

In *United States ex rel. Wagner* v. *Ragen*, 7 Cir., 213 F. 2d 294, the prisoner sought relief under the Civil Rights Act claiming that the warden had unreasonably refused to permit him to submit inventions to the Federal Government. We stated, page 295: " • • • In *Adams* v. *Ellis*, 5 Cir., 97 F. 2d 483, 484, a prisoner in the Texas State Penitentiary filed an action for damages and an injunction under the Civil Rights laws alleging that the prison officials had conspired to and did enforce a set of rules which required censorship of his mail, prevented him from reading law books or making notes, and prevented him from staying in his cell for the purpose of attending to '"emergency legal matters."' However, the court there held, 97 F. 2d at page 485, that the plaintiff while a prisoner did not have 'unrestricted freedom in the receipt and transmission of mail', and that, therefore, the trial court did not err in dismissing his petition. The Supreme Court said in *Price* v. *Johnston*, 334 U.S. 266: 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.'"

In *Miles* v. *Armstrong*, 7 Cir., 207 F. 2d 284, the plaintiff brought an action under the Civil Rights Act against defendants, some of whom were officials of the village of East Chicago Heights, and other defendants were private individuals. We stated at page 287: " • • • However, we do not reach the constitutional question, See *Collins* v. *Hardyman*, 341 U.S. 651, at page 662, for we think that the rights of which plaintiff avers he has been deprived are those which he enjoys under the laws of Illinois and which are incident to state citizenship. The injuries he asserts he has suffered are, in essence, an aggravated assault upon his person and wanton destruction of his

property—grievous injuries surely. But they do not constitute privileges and immunities incident to United States citizenship; they are rather such that the perpetrators are punishable under the state law where reparation may be obtained. * * * Consequently we are impelled to conclude that plaintiff has failed to state a cause of action under Section 47(3) (now Title 42 U.S.C.A. §1983)."

As to the charge made by plaintiff that the warden interfered with his attempted appeals to this court, it should be sufficient to point out to prison officials that in *Cochran* v. *Kansas, et al.*, 316 U.S. 255, 258, habeas corpus was used to challenge the legality of an established practice by prison officials of denying to convicts in their care the opportunity of presenting appeal papers to a higher court.

As plaintiff was unable to be personally present when this appeal was called for oral argument, William C. Wines, Esq., Assistant Attorney General, waived oral argument, and the cause was submitted to us upon the briefs.

We conclude plaintiff did not make a sufficient showing of a violation of the Civil Rights Act. It follows the order and judgment dismissing the complaint must be and is

AFFIRMED.

FINNEGAN, *Circuit Judge*, Concurring. I agree the judgment appealed must be affirmed. Yet I would point up the reason why Atterbury's verified complaint, to which no responsive pleading was filed below, fails in stating a cause of action under the Fourteenth Amendment and 42 U. S. C. §§ 1981, 1983, 1985(2) and (3); R. S. §§ 1977, 1979, 1980. The deficiency lies in the factual situation on which Atterbury bottoms his complaint. It is not how

he has pleaded, as a matter of form or style, but what he has pleaded that cuts ground from under his position. Indeed because he is a layman presenting his appeal pro se, my brothers and I have accorded him the widest latitude. *Whiting* v. *Seyfrit,* 203 F. 2d 773, 774 (7th Cir. 1953); *Allen* v. *Corsanco,* 56 Fed. Supp. 169 (D. Del. 1944).

It is understandable how the bare phrases of the Civil Rights Act would seemingly appear as an open-sesame for bringing about accountability of the state officials and employees named in the complaint. However, those statutory provisions can only be applied within the framework of constitutional law. There is more to the statutory story. Not all torts of state officials are within the ambit of the Act. For Congress, though it exercised its power to create a federal cause of action, has done so only for persons deprived of any rights, privileges, or immunities secured by the Constitution and federal laws. *Collins* v. *Hardyman,* 341 U.S. 651 (1951). Atterbury's complaint, then, must show deprivation of some constitutionally protected right. Or, as put by Mr. Justice Douglas in *Screws* v. *United States,* 325 U.S. 91, 108 (1945): "The problem is not whether state law has been violated but whether an inhabitant of a state has been deprived of a federal right by one who acts under 'color of any law.'"

In his brief (p. 6) the Attorney General of Illinois tells us:

> " • • • the plaintiff has suggested no more than maltreatment at the hands of State prison officials. The more brutal that maltreatment may have been, the greater is an action at law in Illinois courts."

The particular Illinois remedy is left unmentioned. However, we find § 10, Ill. Rev. Stat. 1955, c. 108, implemented by § 16 charges the Illinois Department of Public Safety

with "jurisdiction of the government, discipline and police of the penitentiary, the punishment • • • of the convicts • • • " and directs the Department to "inquire into any improper conduct which is alleged to have been committed by the Warden or any other officer or employee of the penitentiary • • • " More significant, however, is § 38, Ill. Rev. Stat. 1955, c. 108 providing:

> "Whenever several convicts combined, or any single convict, shall offer violence to any officer or guard of the penitentiary, or to any convict, or do or attempt to do any injury to any building or work-shops, or any appurtenances thereof, or shall attempt to escape, or shall disobey or resist any lawful command, the officers of the penitentiary and guards shall use all suitable means to defend themselves, to enforce the observance of discipline, to secure the persons of the offenders, and prevent such attempted violence or escape; and if said officers or guards employed in said penitentiary, or any of them, shall, in the attempt to prevent the escape of any convict, or in attempting to retake any convict who has escaped, or in attempting to prevent or suppress a riot, revolt, mutiny or insurrection, take the life of a convict, such officer or guard shall not be held responsible therefor, unless the same was done unnecessarily or wantonly."

Parenthetically we have also noted that at one time a statute of Illinois provided: "It shall not be lawful in said penitentiary to use any cruel or unusual mode of punishment, or to punish any convict by whipping in any case whatever." Cahill's Ill. Rev. Stat. c. 108 § 37 (1929), but the repeal of this section by the Illinois General Assembly, in an act approved July 8, 1931, L. 1931, p. 1, § 1. leaves § 38 standing. The Attorney General argues in his brief that the tortious conduct of the defendants he represents, "was contrary to State law. Therefore it was not done under color of that law [ed. State] and gives

no rise to a cause of action for invasion of civil rights." On the other hand plaintiff expressly states in his complaint the assaults on his person were committed "under the guise of discipline." While I may think brutality to convicts repugnant, nevertheless there is State legislative authority for discipline and unless such course of treatment and action results in deprivaton of a federal right then no basis appears for interference with the State's internal administration of its penal system.

Even a latitudinarian approach fails to disclose an impingement on some federal right owing to Atterbury. His alleged claim is outside the shelter of the federal constitution. When New York adopted electrocution as its method of carrying out the death penalty, an application for a writ of error on behalf of a condemned man brought the problem of punishment by the States, in the Fourteenth Amendment setting, before the Supreme Court. Denying the writ in that case reported as *In Re Kemmler*, 136 U. S. 436 (1890), Chief Justice Fuller explained the relationship between the cruel and unusual punishment interdiction in the Eighth Amendment and the Fourteenth Amendment, showing the inapplicability of the former Amendment to the States. Subsequently the court decided *Francis* v. *Resweber*, 329 U.S. 459 (1947) where the petitioner had been placed in an electric chair, pursuant to lawful order, and presumably because of some mechanical difficulty death did not result. Issuance of a second death warrant stimulated a series of appeals culminating in several opinions by a divided court, the majority of which found an absence of constitutional infringements. Mr. Justice Frankfurter focused his concurring opinion (id 466-472) on the problem of the Fourteenth Amendment, saying inter alia:

"• • • a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided. But the penological policy of a State is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of 'cruel and unusual punishment.' See *Weems* v. *United States*, 217 U. S. 349, and particularly the dissenting opinion of White and Holmes JJ."

Mr. Justice Cardozo speaking for the Court in *Palko* v. *Connecticut*, 302 U. S 319, 323 (1937) summarized the theme applicable to the current matter:

"We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a State. There is no such general rule."

While plaintiff's incarceration under an unchallenged judgment of conviction eliminates the usual questions of procedural due process, the cases treating with state adjudicatory processes manifest rationale furnishing guidance here. See e.g. *Rochin* v. *California*, 342 U. S. 165 (1952); *Adamson* v. *California*, 332 U. S. 46 (1947); *Pennsylvania* v. *Ashe*, 302 U. S. 51 (1937). Our prior declarations of an absence of power to exercise supervision over Illinois' regulation of its penitentiaries flows from recognizing the power reserved to that State so to do. In re Civil Rights Cases, 109 U. S. 3 (1883).

Under the facts and circumstances of this particular record I am satisfied there was no abuse of discretion when the trial judge dismissed the complaint.

APPENDIX B

JUDGMENT OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
— Tuesday, November 6, 1956
Before
Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
United States of America, ex rel.

George Atterbury
Petitioner-Appellant,

vs.

Joseph Ragen, Warden,
Illinois Penitentiary, et al.,
Respondents-Appellees.

No. 11756
Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was submitted to the Court without oral argument.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.